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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE EDWARD ARRAMBIDE, Defendant and Appellant.	E061817 (Super.Ct.No. RIF1403921) O P I N I O N

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr. and Randall Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, Lawrence Edward Arrambide, of carrying a concealed dirk or dagger (count 1, Pen. Code, § 21310)[1] and receiving stolen property (count 2, § 496, subd. (a)). After a court trial on an allegation defendant had suffered a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)), but prior to rendering any finding, the court granted defendant's *Romero*[2] motion and struck the prior strike allegation. The court sentenced defendant to a determinate term of incarceration of three years eight months.

On appeal, defendant contends the court committed *Miranda*[3] error by permitting a statement defendant made to the arresting officer into evidence. Defendant further maintains this court should reduce his conviction for receiving stolen property to a misdemeanor pursuant to section 1170.18. We affirm.

I. FACTS AND PROCEDURAL HISTORY

On April 6, 2014, an officer driving a patrol car stopped, exited the vehicle, and approached defendant. The officer asked defendant what he was doing. Defendant responded that he had a knife in an open position in his right pocket. The officer handcuffed defendant and conducted a patdown search for the weapon, during which the officer found a pocketknife locked in the open position in defendant's right front pocket.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

The officer retrieved the knife, arrested defendant, and placed defendant in the backseat of the patrol car.

Defendant had also been carrying a reusable shopping bag containing various items in original packaging, some of which contained stickers from Vons. There was no receipt for the merchandise in the bag or on defendant's person. A Vons store was located a short distance from where the officer arrested defendant. The officer placed the shopping bag in the trunk of his vehicle. He and his partner then got into the patrol car and drove toward Vons.

Without any questioning from the officers, defendant stated: "I knew it was pushing my luck doing three in a row." The officer opined the statement meant defendant "had stolen items from the Vons three days, perhaps, or three hours in a row. I wasn't sure. But just three times in a row."

The officer took the merchandise into Vons and presented it to the manager. The manager identified the property as coming from that store as the items had stickers reflecting the store's designated number. The manager looked in the electronic journal, but could not find any purchase that day for up to an hour prior to the officer's detainment of defendant for the total amount of the items or for a single item she selected at random. Surveillance video and photographs taken therefrom reflected someone

wearing clothing which matched defendant's exiting the store carrying a reusable shopping bag while avoiding the security alarm checkpoint.

II. DISCUSSION

A. *Miranda*

Defendant contends his statement he had pushed his luck should have been excluded from evidence as the product of a custodial interrogation initiated without *Miranda* advisements. We disagree.

Defendant filed a motion in limine seeking exclusion of two statements made by defendant to the officer. The officer testified that after handcuffing defendant and placing him in the patrol car, the officer asked defendant where he obtained the items in the reusable bag. Defendant responded, "The Vons." The officer did not provide defendant with *Miranda* warnings before questioning defendant.

The officer then shut the car door, walked to the trunk area of the vehicle, conversed with his partner about the case for a couple of minutes, placed the bag in the trunk, and got back into the vehicle. He then drove toward Vons.

Approximately five minutes after defendant's last statement and without any further questioning or conversation, defendant stated: "I knew it was pushing my luck doing three in a row." The court excluded defendant's first statement as violative of the proscriptions of *Miranda*. However, the court found the act of driving to Vons was not

meant to elicit an incriminating response. Therefore, defendant's latter statement was spontaneous and the court refused to exclude it from trial.

"*Miranda* . . . and its progeny protect the privilege against self-incrimination by precluding suspects from being subjected to custodial interrogation unless and until they have knowingly and voluntarily waived their rights to remain silent, to have an attorney present, and, if indigent, to have counsel appointed. [Citations.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 384.) It is "the settled rule that volunteered statements not the product of interrogation are admissible. As *Miranda* itself made clear, 'There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment . . . .' [Citation.]" (*People v. Edwards* (1991) 54 Cal.3d 787, 815-816 [statement by incarcerated defendant who told officer he was guilty of shooting two little girls without any questioning by the officer was admissible as voluntary and spontaneous statement].) An officer is under no obligation to prevent a defendant from volunteering information. (*Id*. at p. 816.)

"'"'An accused 'initiates'" further communication, exchanges, or conversations of the requisite nature "when he speaks words or engages in conduct that can be 'fairly said to represent a desire' on his part 'to open up a more generalized discussion relating directly or indirectly to the investigation.'"'"' (*People v. Gamache, supra,* 48 Cal.4th at pp. 384-385.) "In reviewing the trial court's denial of a suppression motion . . . , 'it is

well established that we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' [Citation.]" (*Id.* at p. 385.)

Here, there is no dispute defendant was in custody when he made both statements. Defendant's first statement was responsive to the officer's question, which the officer failed to precede with appropriate *Miranda* warnings. Nevertheless, defendant's second statement was not made in response to any questioning or behavior intended or likely to elicit the statement. Moreover, it was made five minutes after defendant's initial statement. Thus, the court properly found defendant's second statement was spontaneous and admission of the statement at trial was not violative of *Miranda*.

B. *Section 1170.18*

Defendant contends this court should, in the first instance, reduce defendant's conviction for felony receiving stolen property to a misdemeanor. Defendant maintains any requirement that he first file a petition in the superior court violates principles of equal protection. We disagree.

"For persons currently serving sentences for a felony conviction that would be a misdemeanor under Proposition 47 . . . the initiative specifies the procedures for relief. 'A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added

this section . . . had this act been in effect at the time of the offense *may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . .*' (§ 1170.18, subd. (a), italics added.)" (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328-1329.)

"The procedure for ruling on a petition for recall requires the trial court to determine whether the prior conviction would be a misdemeanor under Proposition 47, in which case 'the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).)" (*People v. Diaz, supra,* 238 Cal.App.4th at p. 1329.) "[T]he plain language of section 1170.18 set forth above demonstrates that . . . for persons who are currently serving a sentence for a felony reduced by Proposition 47 . . . the remedy lies in the first instance by filing a petition to recall . . . ." (*Id*. at pp. 1331-1332.)

The trial court, not the appellate court, is vested with the authority to reduce a defendant's sentence pursuant to section 1170.18. (*People v. Awad* (2015) 238 Cal.App.4th 215, 221-222.) "Nothing in section 1170.18 suggests that in the first instance the appellate court can designate a prior felony conviction for a Proposition 47 offense to be a misdemeanor." (*People v. Diaz, supra,* 238 Cal.App.4th at p. 1333.) "[T]here can be no doubt that to obtain a redesignation as a misdemeanor for all

purposes, section 1170.18 requires the filing of an application in the superior court of conviction." (*Ibid.*)

The petitioner bears the burden of proof to show eligibility for resentencing under section 1170.18. This includes, in cases of receiving stolen property, that the value of the property stolen did not exceed $950. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 880 [defendant failed his burden to establish eligibility for resentencing under § 1170.18 by failing to prove the value of the items he was convicted of taking did not exceed $950]; accord, *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137.)

Here, defendant has failed to file a petition for resentencing in the superior court. Thus, defendant has deprived the People of the opportunity to adduce evidence at a hearing before the superior court that resentencing defendant might pose an unreasonable risk of danger to public safety and that the value of the property stolen exceeded $950. This reviewing court has no authority to unilaterally declare defendant's felony conviction a misdemeanor.

Furthermore, because, at least in part, defendant did not file a petition for resentencing in the superior court, he has failed to meet his burden of establishing that the value of the 15 stolen items he was convicted of possessing did not exceed $950. Thus, we need not reach defendant's equal protection claim because it is not properly before us.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.